

Professionalism Commission Minutes, October 5, 2005

Judge Battaglia called the meeting to order at 3:00 p.m. Absentees included: K. Hickman, Judge Hong, W. Hudson, Judge Legg, M. O'Connor, J. Otway, R. Jackson, B. Warnken. The minutes from the August 24, 2005 Meeting were approved.

Tom Lynch reported the sense of the subcommittee on Indicia of Professionalism as represented by its Supplemental Report. The subcommittee carefully considered the problem of mandatory compliance with the proposed Code of Professional Conduct (or whatever the final title may be). The subcommittee feels that forcing the drafted Indicia of Professionalism into mandatory rules is akin to forcing a round peg into a square hole: In order to mandate behavior, a code must be made clean and clear - like a criminal statute. Those charged under it must have had clear warning of what is prohibited. But this sort of re-writing takes from the code its value as an aspirational document – a definition of what we are as a profession – making it much more like an extension of the Rules of Professional Conduct. In short, the subcommittee feels that it was charged with the task of defining professionalism and not with the job of writing a disciplinary code.

After discussion, Judge Battaglia summarized the following possibilities: (1) the code can be drafted as (1) a proposed comment to MRPC 8.4; (2) an amendment to Rule 8.4; or (3) an aspirational code only.

Dan Saunders's subcommittee takes the position that the Code must be mandatory and recommends an amendment to Rule 8.4. While the subcommittee reports that codes in most other jurisdictions studied are aspirational, it feels that here, all other approaches to the problem have failed.

Judge Battaglia pointed out that this issue will define the work of the Professionalism Commission. A mandatory code puts us on regulatory track; while an aspirational code commits us to more of an educational role.

The code need not be entirely aspirational or mandatory. Some specific commands can be mandatory while others can reflect our goals and aspirations as a profession.

At present, judges are unclear about what can be done in response to what everyone agrees are professional lapses. It is important that we define with specificity what we expect of ourselves and formulate a workable enforcement mechanism, giving judges the tools necessary to address professional conduct.

The United States District Court gives us an example. There, a judge may refer unprofessional conduct to a three judge panel, which will hear the matter and, if necessary, impose a sanction, usually a period of suspension from practice before that

court. The disciplined attorney may appeal to the Fourth Circuit.

For the next meeting: Dan Saunders's subcommittee will draft "nuts and bolts" rules/tools to address compliance. The Commission will then take up, and possibly vote on the Saunders/Lynch proposals.

The Commission next took up the recommendations of Dana Williams's subcommittee on Discovery Abuse. Taking into consideration the Commission's discussion and suggestions, the subcommittee will make further edits and revisions and present the final recommendation for vote at the next meeting.

The report of the subcommittee on the unauthorized practice of law will be voted on next meeting.

Judge Battaglia reported that she contacted other states on the subject of the professionalism course for new admittees, specifically, whether the course should be given pre or post admission to the bar. The results will be made a part of these minutes and will be a subject for discussion at the next meeting.

The next meeting will be on November 16, 2005 at 3:00 p.m.

Judge Battaglia adjourned the meeting at 6:00 p.m. Various Subcommittee Reports will be made a part of these minutes.

Norman L. Smith, Reporter